NO. 21-55164

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE PLS.COM, LLC,
Plaintiff-Appellant,
v.
THE NATIONAL ASSOCIATION OF REALTORS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:20-cv-04790-JWH-RAO
The Honorable John W. Holcomb

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant The PLS.com, LLC ("PLS") states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

This is a simple but important antitrust case involving the residential real estate industry. The multiple listing services ("MLS") operated by members of the National Association of Realtors ("NAR") have for over a half-century been the dominant networks through which residential real estate is marketed. In recent years, real estate brokers began marketing properties through listing networks such as PLS that compete with the MLS, creating for the first time in living memory the possibility of an alternative to the MLS system. This competition threatened the market power and business interests of the Defendants. Rather than compete on the merits with these new entrants, Defendants agreed through a NAR rule called "Clear Cooperation" to eliminate the ability of brokers to market properties through listing networks that compete with the MLS. By eliminating competition to the MLS, the Clear Cooperation policy harmed everyone but Defendants: PLS suffered injury as an excluded competitor, brokers continue to pay prices above competitive levels for listing network services, and home buyers and sellers are deprived of the ability to purchase a bundle of services that had become increasingly popular before Clear Cooperation. A once-in-a-lifetime opportunity for competition in a monopolized market has been lost.

PLS brought this antitrust action to enjoin Defendants' anticompetitive conduct and to recover damages. But misapplying the relevant law and the Federal

Rules of Civil Procedure, the District Court erroneously dismissed PLS's Complaint with prejudice. The key question presented by this appeal is whether PLS adequately alleged facts that, if true, would demonstrate that the Clear Cooperation policy harms competition in the relevant market for real estate network listing services. This is the market where PLS competed with the MLSs operated by NAR's members. The District Court failed to address this question, disregarding well-pled allegations of harm to competition in the listing network services market and instead focusing on whether the policy harms buyers and sellers of real estate. 1-ER-16. This was clear error. Real estate brokers, not buyers and sellers of real estate, are the direct purchasers of listing network services, and harm to these direct purchasers is actionable harm to competition. *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1151-53 (9th Cir. 2003). The District Court ignored this established principle, an error that infects every part of its analysis and mandates reversal. And the District Court's analysis of harm to the buyers and sellers of real estate was in any event unsupportable on its own merits.

But even were the District Court's decision to dismiss the Complaint defensible, the court plainly erred by failing to allow PLS to amend that Complaint. This Court has consistently instructed the lower courts to permit leave to amend with "extreme liberality." *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) (citation omitted). Even had PLS failed to allege actionable harm to

competition for the reasons the District Court (incorrectly) identified, PLS easily could have amended its Complaint to do so—adding further allegations with respect to harm to the buyers and sellers of real estate on which the District Court (erroneously) focused. And although PLS had previously amended its Complaint, it had done so before the Defendants filed a motion to dismiss, and thus PLS never received guidance from the District Court as to the content of an amended pleading. This Court should therefore at a minimum remand to allow amendment.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337 because the Complaint asserted federal law claims under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. 3-ER-553-554 (Compl. ¶¶ 21-22). The District Court had jurisdiction of the pendent state law claims under 28 U.S.C. § 1367 because they arose out of the same factual nucleus as the federal claims. 3-ER-554 (Compl. ¶ 24).

This Court has jurisdiction under 28 U.S.C. § 1291 because the District Court dismissed the Complaint with prejudice. 1-ER-29-30.

This appeal is timely under Fed. R. App. P. 4(a)(1)(A) because the order dismissing the Complaint was filed on February 3, 2021, 1-ER-30, and the notice of appeal was filed on February 23, 2021. 4-ER-579.

ISSUES PRESENTED

1. Did PLS plausibly allege that it had suffered an antitrust injury from a violation of the antitrust laws?

2. Did PLS plausibly allege that Defendant MRED joined the alleged conspiracy?

3. Did the District Court err by dismissing the Complaint with prejudice and without leave to amend?

STATEMENT OF THE CASE

The following derives from the well-pled factual allegations in PLS's First Amended Complaint, 3-ER-548 ("Complaint" or "Compl.").

A. Multiple listing services are old and slow monopolists.

Multiple listing services are joint ventures of competing real estate brokers. 3-ER-555-556 (Compl. ¶ 32). Participating brokers cooperate to match potential buyers and sellers of residential real estate. *Id.* Transactions, however, are negotiated and consummated between the seller and the buyer outside of the MLS. 3-ER-568-569 (Compl. ¶ 99). MLS members promulgate and enforce rules that govern the way in which brokers participating in the MLS may compete to offer residential real estate brokerage services. 3-ER-555-556 (Compl. ¶¶ 30-33, 35).

The vast majority of residential real estate transactions have historically been facilitated by MLSs affiliated with NAR. 3-ER-549, -555 (Compl. ¶¶ 1, 31). NAR-

affiliated MLSs must adopt NAR's policies, or risk losing valuable benefits provided by NAR. 3-ER-556-557 (Compl. ¶¶ 35-37). A substantial majority of transactions involve the services of real estate brokers, and the vast majority of brokers are NAR members. 3-ER-555 (Compl. ¶¶ 28-29). And a significant number of brokers who are not NAR members are nonetheless members in a NAR-affiliated MLS. 3-ER-556 (Compl. ¶ 34).

MLS membership is generally regarded by real estate brokers as necessary to compete effectively in providing residential real estate brokerage services. 3-ER-555-556 (Compl. ¶ 32). Brokers' need for access to the MLS gives the MLSs market power, and with that market power comes the ability to impose and enforce anticompetitive restraints of trade, in the form of MLS rules.[1] 3-ER-549, -555-556, -569-570, -572-573 (Compl. ¶¶ 2-4, 32, 101, 104, 113, 115). NAR-affiliated MLSs have enjoyed durably high market shares as a result of their market power. 3-ER-557 (Compl. ¶ 38).

Because historically almost all properties have been marketed through the MLSs, competing with these MLSs has been extraordinarily difficult. 3-ER-559-

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[1] NAR and its members have a long history of using the market power of the MLSs to restrain competition. *See, e.g.*, *United States v. Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950) (board of real estate brokers conspired to fix commission rates); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1370 (5th Cir. 1980) (MLS restrictions on membership violated antitrust laws).

560, -569 (Compl. ¶¶ 50-51, 101). Secure behind these previously-impregnable entry barriers, MLSs have become old and slow monopolists. 3-ER-557-559 (Compl. ¶¶ 38, 41-46). The unrestrained exercise of market power by NAR-affiliated MLSs created demand for alternatives to the MLS system. 3-ER-549, -559, -560-561 (Compl. ¶¶ 6, 47-48, 54-58). To better serve their customers, real estate brokers demanded enhanced privacy protection, lower costs, more innovative services, and the creation of a national listing network. *Id.* However, due to the entry barriers protecting the NAR-affiliated MLSs, demand for alternatives to the MLS system went unmet because the NAR-affiliated MLSs could ignore these demands for a more competitive future. *Id.*

B. Pocket listings and PLS threatened the MLSs' market power.

In recent years, demand for alternatives to the NAR-affiliated MLSs found expression in "pocket listings," or residential real estate marketed between real estate brokers outside of the MLS system. 3-ER-549-550 (Compl. ¶¶ 6-7). As with listings marketed through the MLSs, pocket listings are marketed by real estate brokers to other real estate brokers. 3-ER-550 (Compl. ¶ 8). But unlike listings marketed through the MLS, pocket listings allow sellers to customize and limit the amount of information shared about a listing. 3-ER-549-550, -561 (Compl. ¶¶ 6, 61). Pocket listings thus allow sellers to maintain their chosen level of privacy and discretion in connection with the sale of their home, in ways that are not possible when marketing

the same property through the MLS. *Id.* Demand for pocket listings has grown in recent years. 3-ER-550 (Compl. ¶ 7).

NAR and the NAR-affiliated MLSs knew they were sitting on a powder keg of frustrated demand for an alternative to the MLS system, and that pocket listings were the vehicle by which that more competitive future would arrive. 3-ER-549-551, -560-561, -562 (Compl. ¶¶ 5, 9, 10-11, 52-57, 67-68). Real estate brokers have in the past threatened to pull their listings from the MLS system and create an alternative, nationwide listing network that would better serve brokers and their customers. 3-ER-559 (Compl. ¶ 48). Pocket listings created, for the first time in many decades, the possibility of effective head-to-head competition to the MLS system—and with it the prospect of lower prices, increased privacy, and more innovation. 3-ER-549-550, -555, -560 (Compl. ¶¶ 5, 7, 9, 31, 51-53). As more listings were marketed as pocket listings and outside of the NAR-affiliated MLSs, the possibility of new listing networks that would compete with the MLS system became real. 3-ER-550, -560 (Compl. ¶¶ 9, 51-53).

Plaintiff PLS was formed in 2017 to address the demand by real estate brokers for a nationwide pocket listing service, as well as for an alternative to the NAR-affiliated MLS system. 3-ER-561 (Compl. ¶ 58.) Before passage of the Clear Cooperation Policy in 2019, PLS grew quickly and brokers used it to meet their

customers' demand for pocket listing services. 3-ER-550, -562, -572-573 (Compl. ¶¶ 8, 64-68, 115).

PLS was the competitive threat that the MLS system had feared. 3-ER-551 (Compl. ¶ 12). As with the MLS, PLS membership is available only to real estate brokers. 3-ER-561 (Compl. ¶¶ 59-60). As with the MLS, brokers share information through PLS about properties for sale and cooperate to match buyers and sellers. But unlike the MLS, PLS offered sellers the ability to share as much or as little information about their property as they desired. *Id.* (Compl. ¶ 61). And unlike the MLS, PLS was a nationwide network with a single and lower fee, just as brokers had long demanded. 3-ER-559-562 (Compl. ¶¶ 47-60, 64-65). In this way, PLS combined the privacy and discretion of pocket listings and the scale economies of a national listing network. 3-ER-551, -561 (Compl. ¶¶ 12, 61). PLS grew into a unique competitive threat to the viability of the MLS system. 3-ER-551, -562 (Compl. ¶¶ 12, 65-68).

C. Defendants conspired to eliminate competition to the MLS.

NAR and the MLS system reacted with alarm to the expansion of PLS. 3-ER-551-552, -562, -564 (Compl. ¶¶ 11-13, 68-69, 78). Because demand for an alternative to the NAR-affiliated MLSs and the rise of pocket listings were nationwide phenomena, Defendants knew that a nationwide solution to the competitive threat posed by PLS was necessary. 3-ER-562-563 (Compl. ¶ 70).

NAR, with its national footprint and ability to enact rules that would bind MLSs nationwide, was the ideal vehicle to extinguish the nationwide threat of competition to the MLS system. *Id.*

The conspiracy to extinguish PLS was hatched: MLSs communicated privately among themselves, formulated a common response to the threat of competition from listing networks aggregating pocket listings, and then proposed that common response to NAR to ensure that it would be implemented and enforced by MLSs nationwide. That response was the "Clear Cooperation" policy, 3-ER-563-568, -569-570 (Compl. ¶¶ 71-96, 102-105).

The Clear Cooperation policy was first recommended for approval at an August 2019 NAR committee meeting attended by Defendant Midwest Real Estate Data, LLC ("MRED"). In September 2019, MRED, Bright MLS, Inc. ("Bright"), and California Regional Multiple Listing Service, Inc. ("CRMLS")—collectively, the "MLS Defendants"—jointly published a white paper stressing the competitive threat the MLS systems faced from the rise of pocket listings and the competing listing networks that pocket listings enabled, and calling for collective action to eliminate that threat. 3-ER-551, -563-564 (Compl. ¶¶ 11, 75).

Some real estate brokers who are NAR members wished to continue marketing pocket listings through listing networks competing with the MLSs, and believed that the Clear Cooperation policy was anticompetitive and likely illegal. 3-

ER-566 (Compl. ¶ 88). Thus, in October 2019, the MLS Defendants began working in tandem to overwhelm the resistance by these NAR members to the adoption of the Clear Cooperation policy. 3-ER-563-566 (Compl. ¶¶ 75-88).

On October 16, 2019, Bright adopted a variant of what would become the Clear Cooperation policy. 3-ER-564 (Compl. ¶ 76). On or about the same day, MRED published a statement supporting the adoption by NAR of Clear Cooperation. *Id.* (Compl. ¶ 77). The next day, MRED's CEO addressed a conference of NAR-affiliated MLSs, and urged the adoption of Clear Cooperation. She explained that the rise of pocket listings was contrary to the business interests of the assembled MLSs. *Id.* (Compl. ¶ 79). Bright's Chairman also addressed the conference and delivered the same message, stressing five things: (i) pocket listings were contrary to the business interests of the assembled MLSs; (ii) Bright and MRED had already taken action to eliminate pocket listings; (iii) adoption of Clear Cooperation by NAR was necessary to advance the business interests of the assembled MLSs; but (iv) some NAR members were resisting Clear Cooperation; and for this reason (v) concerted action among the MLSs was necessary to overcome that resistance at the NAR convention. 3-ER-564-565 (Compl. ¶¶ 80-85).

The NAR-affiliated MLSs followed MRED and Bright's lead at the November 2019 NAR convention. 3-ER-566 (Compl. ¶ 86). Bright and MRED once again urged the adoption of the Clear Cooperation policy, this time joined and

supported by the representatives of other NAR-affiliated MLSs. *Id.* To gather support, proponents touted the elimination of competition to NAR-affiliated MLSs from networks aggregating pocket listings. *Id.* The efforts of the MLS Defendants bore fruit: Clear Cooperation was approved by the NAR Board two days later. 3-ER-566 (Compl. ¶¶ 87-88).

D. The Clear Cooperation policy is anticompetitive.

The Clear Cooperation policy requires that all listings publicly marketed by participants in a NAR-affiliated MLS must be submitted to the MLS. 3-ER-566-567 (Compl. ¶¶ 88-92). An exception to the policy was made for so-called "office exclusives," or pocket listings marketed within a single brokerage firm but not on a competing listing network. 3-ER-567 (Compl. ¶ 93). MLS members that violate Clear Cooperation are subject to punishment, and are unable to access MLS services on commercially reasonable terms—threatening their livelihood and ensuring their compliance. 3-ER-567-568 (Compl. ¶ 94).

The Clear Cooperation policy eliminates the ability of listing networks aggregating pocket listings to compete with the MLS, just as the Defendants planned. 3-ER-552, -568 (Compl. ¶¶ 14-15, 96). By forcing real estate brokers to use the MLS for all listings—even if those listings are also posted on a competing listing network—Clear Cooperation eliminates the incentive for brokers to use competing networks at all, as well as the ability of those competing networks to offer

valuable services to brokers in competition with the MLS. 3-ER-570-572 (Compl. ¶¶ 106-113). Brokers are harmed by the elimination of competition in the listing network market. 3-ER-572-573 (Compl. ¶¶ 112-115). Brokers and their customers are also harmed by the elimination from the market of a desired product—pocket listings marketed through listing networks. 3-ER-572-573 (Compl. ¶ 115). Because pocket listings have a unique combination of privacy-related features that the NAR-affiliated MLSs generally do not accommodate, the net effect of the Clear Cooperation policy is to preclude brokers from marketing pocket listings through *any* listing service. 3-ER-561 (Compl. ¶ 61).

PLS was injured by the Clear Cooperation policy, just as the Defendants intended. 3-ER-575 (Compl. ¶¶ 121-122). Conversely, Defendants benefit financially from the exclusion of listing networks that compete with the MLS. 3-ER-551-552, -562-563, -569-570, -574 (Compl. ¶¶ 11, 14-15, 68-70, 102, 105, 119).

The Clear Cooperation policy has no procompetitive benefits, or at least none that outweigh its anticompetitive effects. 3-ER-573-575 (Compl. ¶¶ 116-120). NAR has in the past recognized that it is improper to use the market power of the MLS to force real estate brokers to submit listings to the MLS. 3-ER-573 (Compl. ¶¶ 117-118). The "office exclusive" exception shows that Defendants have no objection to pocket listings as long as they are not marketed through a listing network that

competes with the MLS system and threatens their market power. 3-ER-573 (Compl. ¶ 116).

E. PLS files this lawsuit.

PLS brought this action in May 2020, asserting antitrust claims under Section 1 of the Sherman Act, 15 U.S.C. § 1. PLS also brought parallel state-law claims under California's Cartwright Act, Bus. & Prof. Code § 16720, which are evaluated under similar standards. The Complaint sought injunctive relief and damages.

After meeting and conferring with the Defendants pursuant to the rules of the Central District of California—and before the Defendants had answered or otherwise responded to the initial Complaint—PLS filed an amended Complaint. Defendants moved to dismiss, arguing that PLS failed to state an antitrust claim because PLS did not sufficiently allege harm to consumers and competition and thus did not allege antitrust injury. 1-ER-26. PLS opposed dismissal, and requested leave to amend its Complaint if the motions to dismiss were granted. 3-ER-339, -375.

The District Court granted the motions to dismiss with prejudice, finding that although PLS met the "constitutional requirement for injury-in-fact and the first element of antitrust injury," *i.e.*, harm to PLS (1-ER-17-18), PLS did not sufficiently allege harm to "ultimate" consumers and thus competition. 1-ER-18-25. The District Court concluded that, to allege harm to competition, PLS must allege a

"plausible injury to ***both*** home sellers ***and home buyers***," 1-ER-22. For this reason, the District Court held that PLS failed to allege an antitrust injury.

The District Court further held that, notwithstanding its "analysis and conclusion with respect to the element of antitrust injury … PLS has alleged facts plausibly to show that the Clear Cooperation Policy is a *prima facie* unreasonable restraint of trade under the Rule of Reason framework," and had sufficiently alleged the remaining elements of its Section 1 claim with respect to all Defendants other than MRED. 1-ER-29. The court concluded that PLS adequately pled facts demonstrating concerted action by NAR, Bright, and CRMLS because "NAR promulgated the Clear Cooperation Policy," and Bright and CRMLS were obligated to adopt it. 1-ER-27-28. The District Court held, however, that PLS had not sufficiently alleged that MRED joined the conspiracy. 1-ER-28.

Relying on the fact that PLS had already amended once (albeit before Defendants had answered or otherwise responded to the initial Complaint), and on its unelaborated conclusion that amendment would be futile, the District Court dismissed the Complaint without affording PLS leave to amend to address the court's concerns. 1-ER-26.

This appeal followed.

SUMMARY OF THE ARGUMENT

The District Court's order dismissing this lawsuit with prejudice was manifestly incorrect.

First, the District Court erred in concluding that PLS failed to plead a claim under Section 1 of the Sherman Act. While its analysis is internally inconsistent and at times hard to discern, the court held that PLS adequately pled facts demonstrating that the Clear Cooperation policy is an unreasonable restraint of trade. There can be no doubt of this: The policy restricts how real estate brokers that participate in the MLS system may market real estate outside the MLS system, in contravention of numerous cases including *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104-13 (1984). *See* Part I.A.

In concluding that the Complaint should nonetheless be dismissed, the District Court held that PLS had not alleged harm to competition in the relevant market, which it considered to be the "real estate market" where buyers and sellers of real estate transact. But under controlling precedent, the correct market for the analysis here is the market where real estate brokers purchase real estate listing network services. *See, e.g.*, *Freeman*, 322 F.3d at 1151-53; *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015). That is an "upstream" market, where brokers purchase listing network services in order to then provide brokerage services to home buyers and sellers in a "downstream" market; and it is on that upstream market that the District

Court needed to focus. *See* Part I.B.1. None of the cases on which the District Court relied for its contrary rule is on point (*see* Part I.B.2); and *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018) ("*Amex*") does not stand for the proposition that PLS needs to allege harm to competition "on both sides of the market," as the District Court believed. *See* Part I.B.3. PLS, in any event, adequately pled harm to competition both in the relevant market and in the downstream market analyzed by the court. *See* Part I.B.4

Finally, the District Court plainly erred in holding that the harm to PLS from Clear Cooperation was not an antitrust injury under Section 4 of the Clayton Act because it purportedly did not derive from conduct that harmed competition. This error also flowed the court's focus on the wrong market, and ignored the well-pled allegations in the Complaint. *See* Part I.C.

Second, the District Court erred in finding that PLS failed to sufficiently allege MRED's participation in the conspiracy. Although MRED is not formally affiliated with NAR, the Complaint plausibly alleged detailed evidentiary facts that MRED joined the alleged conspiracy with the intent of achieving its unlawful purpose and took overt acts in furtherance of its ends. That is all that is required. *See* Part II.

Third, even if the District Court had correctly dismissed the Complaint, it abused its discretion by denying PLS leave to amend. Although PLS had amended the Complaint once before, it had done so before the Defendants filed their motions

to dismiss, and without any insight into the District Court's views on the law. PLS easily could have amended its Complaint to satisfy the court's concerns, were they even valid. Dismissal with prejudice was thus inappropriate. *See* Part III.

STANDARD OF REVIEW

A district court order dismissing a complaint for failure to state a claim is reviewed *de novo*. *Rick-Mik Enters., Inc. v. Equilon Enters. LLC*, 532 F.3d 963, 970 (9th Cir. 2008). A decision to deny leave to amend is reviewed for abuse of discretion. *Navajo Nation v. U.S. Dep't of Interior*, __ F.3d __, 2021 WL 1655885, at *6 (9th Cir. Apr. 28, 2021). But "a district court's exercise of discretion based on an erroneous interpretation of the law constitutes an abuse of discretion." *Id.* (citation omitted). And "dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Id.* (citation omitted).

ARGUMENT

I. The Complaint States A Claim.

To state a claim for a violation of Section 1 of the Sherman Act, a private plaintiff must allege (1) an agreement among two or more distinct business entities to unreasonably restrain trade (2) that caused the plaintiff to suffer antitrust injury. *In re NFL's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1150 (9th Cir. 2019)

("*NFL's Sunday Ticket*").[2] The District Court erred by holding that PLS had failed adequately to allege antitrust injury. Antitrust injury requires (1) an injury in fact that flows from (2) some harm to competition in violation of the antitrust laws. *Am. Ad. Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1055 (9th Cir. 1999). The District Court correctly held that PLS adequately alleged injury in fact. But its analysis of harm to competition was fundamentally flawed and internally inconsistent.

Section I.A explains why the Clear Cooperation policy is an unreasonable restraint of trade under Section 1 of the Sherman Act, a conclusion with which the District Court seems to have agreed. Section I.B explains why the District Court erred by disregarding the Complaint's well-pled allegations of harm to real estate brokers, the direct purchasers in the relevant market harmed by the Clear Cooperation policy, and why the Complaint adequately alleges harm to competition in any possible relevant market. Section I.C addresses the related but analytically

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[2] The District Court appeared to believe that *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985), supplied the standard against which the anticompetitive effects of Clear Cooperation should be evaluated. 1-ER-18-19. This was clear error, as *Aspen Skiing* describes the standards applicable to exclusionary conduct under Section 2 of the Sherman Act, not to unreasonable restraints of trade under Section 1. *See* P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 2130 (8th ed. 2020) ("Hovenkamp") ("Joint ventures are analyzed under the restraint-of-trade standard generally applied to antitrust agreements, not to the quite distinct standard applied to single-firm conduct under § 2 of the Sherman Act."). The distinction is substantive and material, as conduct may violate Section 1 and not Section 2. *Id.*

distinct concept of antitrust injury under Section 4 of the Clayton Act, and shows that the injury in fact alleged by PLS flows from the competition-reducing aspects of the Clear Cooperation policy.

A. Clear Cooperation is an unreasonable restraint of trade under Section 1 of the Sherman Act.

"An agreement between competitors (a horizontal agreement) satisfies the requirement of showing harm to competition if it reduces competitors' independent decisions about whether and how often to offer to provide services … or otherwise limits competitors' freedom to compete." *NFL's Sunday Ticket*, 933 F.3d at 1150-51 (cleaned up). Rules governing a joint venture that limit how joint-venture participants may offer services other than through the joint venture have long been understood to harm competition when the joint venture has market power or when the restraint is a naked restriction on output by venture participants. *NCAA*, 468 U.S. at 104-13.

In *NCAA*, for example, the Supreme Court held that the NCAA's rules restricting its member universities (*i.e.*, its constituent joint venturers) from broadcasting televised college football games outside the NCAA's control harmed competition by limiting "the quantity of television rights available for sale" to broadcasters. 468 U.S. at 99, 105. This Court recently applied the same rule in *NFL's Sunday Ticket*, holding that the plaintiffs had adequately alleged harm to competition with allegations that similar broadcast restriction rules imposed upon

professional football teams. 933 F.3d at 1151-52. And the Second Circuit applied the same principles in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239-42 (2d Cir. 2003), finding harm to competition from a restriction that barred participants in Visa's network from working with competing credit card networks. The *Visa* court explained that such restraints are "exemplars of the type of anticompetitive behavior prohibited by the Sherman Act." *Id.* at 242; *see also Chicago Prof'l Sports Ltd. v. NBA*, 961 F.2d 667, 673-76 (7th Cir. 1992) (Easterbrook, J.) (NBA policy restricting teams from broadcasting more than 20 games outside of league-authorized channels violated Section 1).

By restricting how real estate brokers may market pocket listings on listing networks, the Clear Cooperation policy imposes a straightforward restriction on output on all fours with those condemned in *NCAA*, *NFL's Sunday Ticket*, *Visa*, and *Chicago Professional Sports*. Before Clear Cooperation, brokers offered their clients a specific bundle of services: pocket listings marketed through listing networks. Clear Cooperation eliminates this specific bundle of services from the market, simultaneously injuring PLS, harming competition in the listing network services market, and restricting the provision of brokerage services.

The antitrust laws are especially concerned with agreements among competitors that limit consumer choice. As the Supreme Court explained, "since Congress designed the Sherman Act as a 'consumer welfare prescription,'" the

"most significant" harm from an agreement among competitors to restrain competition is the creation of a market that is "unresponsive to consumer preference." *NCAA*, 468 U.S. at 106-07 (cleaned up). This is because antitrust law is based on the principle that competition—not a combination of competitors—is the "best method of allocating resources in a free market," and that "all elements of a bargain … are favorably affected by the free opportunity to select among alternative offers." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978). An agreement to eliminate a service from the market demanded by consumers is thus "[a] refusal to compete with respect to the package of services offered to customers" and a naked restraint that is *prima facie* illegal under Section 1. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459-62 (1986); *see also Sullivan v. NFL*, 34 F.3d 1091, 1101 (1st Cir. 1994) (condemning horizontal agreement that "completely wipes out" a certain product (a type of ownership interest in an NFL team), making the market "plainly unresponsive to consumer demand").

But that is not the only respect in which the Clear Cooperation policy constitutes an anticompetitive restraint of trade. In addition to functioning as a restraint on the output of brokerage services, the Clear Cooperation policy *is also* an exclusionary practice that harms competing listing network services like PLS by cutting them off from inputs they need to compete: real estate listings. Hovenkamp, ¶ 2001 (explaining that anticompetitive agreements among competitors "are

properly treated both as internal output limitation rules and exclusionary practices, and often the way they are treated depends on the identity of the plaintiff."). The Clear Cooperation policy is analogous in this way to the restraint that the Supreme Court considered in *Indiana Federation of Dentists*, 476 U.S. at 449-60. That case concerned allegations that a dentist trade group violated Section 1 of the Sherman Act by requiring its member dentists to withhold x-rays from insurers who purchased dental services on behalf of their members. *Id.* at 449-52. In addition to analyzing this restraint as a "reduction of output" that limited the availability of dental services, *id.* at 460, the Supreme Court noted that "[t]he policy of the Federation with respect to its members' dealings with third-party insurers" also "resembles practices that have been labeled 'group boycotts,'" *id.* at 458.

Similarly, although the restraints at issue in *Visa* were analyzed as restraints on output to *customers* of credit cards, the district court explained that they could also be considered "boycotts" of *other suppliers* of competing credit cards. *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 401 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229. Many other cases stand for the same proposition, and hold that an output restraint that harms consumers may also be analyzed as exclusionary conduct that harms competitors. *See, e.g.*, *Am. Med. Ass'n v. United States*, 317 U.S. 519 (1943) (association of doctors conspired through the code of ethics of their trade association to coerce members of the association from working with new entrant that threatened

the business interests of the defendants); *ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547 (8th Cir. 1991) (association of auto dealers threatened by entrance of real estate developer that would have facilitated price competition among dealers); *Penn. Dental Ass'n v. Med. Serv. Ass'n*, 815 F.2d 270 (3d Cir. 1987) (rules of association of competing dentists injured both insurer and the dentists' customers).

As an excluded competitor, PLS in this case stands in the shoes of the boycotted insurers in *Indiana Federation of Dentists*, the boycotted credit card networks in *Visa*, the boycotted insurer in *Pennsylvania Dental*, the boycotted group health plan in *AMA*, and the boycotted auto mall in *ES Development.* As a boycott, the Clear Cooperation policy harms competition because it is an exercise of the Defendants' control of the MLS system to force real estate brokers to "cut off [PLS's] access to a supply" of listings "necessary to enable [PLS] to compete." *Hahn v. Or. Physicians' Serv.*, 868 F.2d 1022, 1030 (9th Cir. 1988); 3-ER-559-560, -572 (Compl. ¶¶ 50-52, 112-113). Excluding PLS and the other listing network services that had threatened Defendants by competing with pocket listings allowed the NAR-affiliated MLSs to maintain their market power—to the direct detriment of brokers who preferred the option to list through these excluded alternatives. 3-ER-558-559, -560-562, -572 (Compl. ¶¶ 41-47, 52-57, 63-64, 114).

The District Court correctly found that the Clear Cooperation policy is an agreement among and between NAR and NAR-affiliated MLSs. 1-ER-27-28. This

is black letter law, and NAR did not argue otherwise before the District Court. The District Court also correctly found that PLS had alleged all of the remaining elements of its Section 1 claim. 1-ER-28. However, the District Court held that "PLS does not allege any facts showing when, where, or, notably, how the output of real estate brokerage services or off-MLS listing services has decreased." 1-ER-20-21. In reaching this result, the District Court ignored the Complaint's well-pled allegations of fact, misapprehended the substantive antitrust implications of those allegations, drew adverse inferences against PLS, and even substituted its own version of the facts for the ones alleged by PLS and conceded by the Defendants.

These errors require reversal.

B. PLS adequately alleged harm to competition.

Antitrust analysis under the Sherman Act focuses on whether a "challenged restraint has a substantial anticompetitive effect that harms consumers *in the relevant market*." *Amex*, 138 S. Ct. at 2284 (emphasis added); *see also Am. Ad. Mgmt.*, 190 F.3d at 1055-57 (analysis focuses on whether the plaintiff has alleged injury "in the market where competition is being restrained"). The relevant market alleged by PLS is the market for the provision of listing network services to real estate brokers, which those brokers then use to facilitate the sale of residential real estate. 3-ER-568 (Compl. ¶¶ 97-98). All of the District Court's errors flow from its basic failure to analyze harm to competition in the relevant market that PLS alleged.

1. The District Court required allegations of anticompetitive effects at the wrong market level.

PLS alleged that the Clear Cooperation policy harms competition in the market for real estate listing network services. 3-ER-572-573 (Compl. ¶¶ 112-115). The market for real estate listing network services is an "upstream" market, where the consumers in that market (the brokers) use the product they are purchasing in the upstream market (listing network services) as an "input" to provide a separate service in a "downstream" market (brokerage services) to consumers in that downstream market (home buyers and sellers).

In cases alleging harm to these types of upstream input markets, a plaintiff states a claim by alleging facts that show harm suffered by the direct purchasers of the inputs at issue, without regard for anticompetitive effects suffered by indirect purchasers in downstream markets. *See Hanover Shoe, Inc. v. United States Mach. Corp.*, 392 U.S. 481, 488-89 (1968); *see also* Hovenkamp, ¶ 345 (explaining that "the correct approach" focuses on harm "to direct purchasing consumers" in these markets, rather than to consumers in related but distinct downstream markets). Indeed, under the Supreme Court's landmark decision in *Illinois Brick Co. v. Illinois*, indirect purchasers—such as the buyers and sellers of real estate misidentified by the District Court as the focus of antitrust analysis—lack antitrust standing to seek damages for the conduct alleged in the Complaint, since it is "the overcharged direct purchaser" who "is the party 'injured in his business or property' within the meaning

of" the Clayton Act. 431 U.S. 720, 729 (1977). The District Court's holding turns this settled law on its head.[3]

In *Case-Swayne Co. v. Sunkist Growers, Inc.*, for example, this Court analyzed alleged harm to competition in the relevant market for juice-grade oranges by assessing the impacts on the orange juice manufacturers who bought those oranges, not the downstream impacts upon the grocers who bought the juice or the ultimate consumers who drank it. 369 F.2d 449, 457 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967). Rejecting the precise argument on which the District Court relied below, this Court held that harm to consumers in an upstream market is all that matters, and that proof of anticompetitive effects in the downstream market for finished products is unnecessary. *Id.* So too in *Knevelbaard Dairies v. Kraft Foods, Inc.*, where this Court held that harm to an upstream market for milk was sufficient to establish harm to competition, and rejected the defendants' argument that competition was not harmed because ultimate consumers of cheese paid *less* as a result of the conspiracy. 232 F.3d 979, 988 (9th Cir. 2000).

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[3] Anticompetitive effects upon downstream end users may provide an alternative basis to establish harm to competition, but they are not necessary to state a claim. *See generally* C. Hemphill and N. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2087-92 (2018) ("numerous cases are premised on input market effects alone" even where "immediate harm to the output market may be attenuated or absent").

Most recently, this Court in *O'Bannon*, 802 F.3d at 1049, rejected the precise theory embraced by the District Court. In *O'Bannon*, the defendants restrained competition for the services of college athletes, and defended their restraint on the ground that consumers in the downstream market—viewers of televised college athletic events—had not been harmed. The district court rejected this argument, focusing instead on harm to the direct purchasers in the relevant market (student athletes) rather than harm to consumers in the related, but distinct, downstream market (viewers of college athletic events). *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 972-73 (N.D. Cal. 2014). This Court affirmed in relevant part, finding antitrust injury based on harm to student athletes even though "consumers of NCAA football and basketball may not be harmed directly" by the challenged conduct. 802 F.3d at 1071. That conclusion followed naturally from this Court's two seminal antitrust injury opinions, both of which credited harm to competition in upstream input markets for advertising-related services (rather than downstream markets for advertising served to ultimate consumers), and neither of which required the proof of downstream market effects required by the District Court. *Am. Ad Mgmt.*, 190 F.3d at 1055; *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158 (9th Cir. 1991).

None of this is controversial. The Supreme Court has repeatedly recognized that anticompetitive conduct violates antitrust law even when it only or primarily

affects a market that does not involve ultimate end users and instead is an "input" market "upstream" from those ultimate consumers. *See, e.g.*, *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948) (challenged conduct harmed competition "even though … the persons specially injured" were "sellers" and not final "customers or consumers"); *Weyerhaeuser Co. v. Ross-Simmons Harwood Lumber Co.*, 549 U.S. 312, 321-25 (2007) (conduct harmed competition in an input market "[e]ven if output prices remain constant" for end users).

The other courts of appeals are similarly in accord in rejecting the notion that a plaintiff must allege, or ultimately prove, additional downstream effects in related, but distinct, markets:

- The Seventh Circuit has explained that an antitrust plaintiff has no obligation to "articulat[e] how the welfare of the ultimate consumer has been diminished by an injury to competition at *another* level." *Fishman v. Estate of Wirtz*, 807 F.2d 520, 535-38 (7th Cir. 1986).
- In *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005), an antitrust case involving artificial teeth, the Third Circuit held that it was "clear error" to enter judgment for the defendant on grounds that the government purportedly failed to establish that the challenged conduct harmed "the 'ultimate consumers' who used the teeth." *Id.* at 188, 190. Correcting the district court's "mis-focus," the panel explained that

"scrutiny should have been applied not to the 'ultimate consumers' who used the teeth, but to the 'customers' *who purchased the teeth*" and sold it to users, whom the court identified as "the relevant category" of consumer. *Id.* at 190.

- The First Circuit rejected the District Court's argument in *Sullivan*, where the NFL contended that the challenged policy could not harm competition since it "does not affect the normal consumer of the NFL's product," holding instead that such downstream effects were "not relevant to whether the policy affects output and prices *in the relevant market* for ownership interests." 34 F.3d at 1101 n.3.
- In *Telecor Communications, Inc. v. Southwest Bell Telephone Co.*, 305 F.3d 1124 (10th Cir. 2002), the Tenth Circuit rejected the same argument that an antitrust plaintiff "must prove end-user impact," emphasizing that harm to "suppliers" upstream constitutes harm to competition "even when the anti-competitive activity does not harm end-users." *Id.* at 1133-36.
- The D.C. Circuit has gone so far as to state that "no court has ever held that a reduction in competition" upstream only violates the antitrust laws if "the plaintiff can prove impact at the consumer level"

downstream as well. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 719 (D.C. Cir. 2001).

In fact, courts have already applied these general principles to network service markets, and to real estate listing network service markets in particular. In *Visa*, for example, the Second Circuit found anticompetitive effects in the market for "general purpose card network services" by assessing harm to "issuer banks" who were the direct purchasers of network services, and not consumers who use the cards. 344 F.3d at 239-241; *see also* Hovenkamp, ¶ 564 (courts must "disaggregate" harm to upstream "transaction services" markets "from the good or service to which the transaction is attached" downstream).

In this respect, this Court's decision in *Freeman* is exactly on point. *Freeman* concerned allegations that defendant MLSs and realtor associations conspired to inflate MLS subscription fees to real estate brokers. 322 F.3d at 1142. Reversing entry of summary judgment for the defendants and directing judgment for the plaintiffs instead, this Court found that real estate brokers were the relevant "consumers" in the market for the MLSs' listing network services, and held that the harms *they* suffered from the defendants' conduct—without reference to or consideration of how the challenged restraint might affect downstream buyers and sellers of residential real estate—established harm to competition sufficient to support a Section 1 violation. *Id.* at 1151-53. The decision rejected as irrelevant the

defendants' contrary argument, raised in their briefs, that the challenged restraint could not harm competition because its effects benefited individual home buyers and sellers downstream by "providing" them with "maximum exposure of a home." Defs.' Opening Brief, *Freeman v. San Diego Ass'n of Realtors*, No. 01-56199, 2001 WL 34091349, at *39 (9th Cir. filed Dec. 20, 2001).

Freeman required the District Court to focus its analysis of the alleged harm to competition here on the harm to real estate brokers who purchase real estate listing network services. The District Court erred by instead requiring allegations of harm to the downstream buyers and sellers of real estate.

2. The case law does not support the District Court's insistence on harm to "ultimate consumers."

Casting these cases aside, the District Court announced a new rule that antitrust plaintiffs must plausibly allege "harm to the ultimate consumer" in order to state a claim, even if the anticompetitive conduct restrained trade in the upstream market. 1-ER-16. Because the District Court summarily (and incorrectly, *see infra* Part I.B.4.b) determined that PLS failed to allege "*plausible* injury" to home buyers and sellers in the downstream market for brokerage services, 1-ER-20 (emphasis original), the court held that the Complaint failed to state a claim.

None of the cases cited by the District Court supports its novel rule. Its reliance upon *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340-42 (1990) ("*ARCO*") (cited 1-ER-16) misreads that decision. The Supreme Court never

asserted any "ultimate consumer" rule in that case—the excerpt cited by the District Court only generally reviews prior Supreme Court decisions applying the axiom that antitrust injury must derive from harm to competition—and if anything appears to indicate that harm to *either* intermediate *or* ultimate purchasers of the defendants' gasoline would have been actionable harm to competition. *See id.* at 345 (holding that anticompetitive effects upon "consumers *and the manufacturers' own dealers*" are actionable antitrust injuries) (emphasis added).

The District Court's favorable citation to *NCAA*, 468 U.S. at 114-15 (cited 1-ER-21 n.81) also confounds. The anticompetitive price and output effects involved in that case were analyzed primarily at the *upstream* level of broadcasters who were the direct purchasers of the rights to broadcast games, not at the level of the ultimate user who watches college football on television. *Id.* at 99, 105 ("the NCAA's output restriction" limits "the quantity of television rights available for sale" to broadcasters and "has the effect of raising the price the networks pay for television rights").

The other cases referenced by the District Court similarly do not support its holding. In *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1445 (9th Cir. 1995) (cited 1-ER-16), this Court expressed the general rule that an antitrust plaintiff must demonstrate that a defendant's challenged conduct "injur[es]" or "threatens" "consumer welfare," *id.* at 1445-46, but the Court did not reject the notion that upstream direct purchasers may be consumers, or hold that conduct which harms

those direct purchasers is not actionable. And neither of the Supreme Court's decisions in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10 (1986), and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (1-ER-16), say anything about restricting actionable anticompetitive effects to only those suffered by ultimate consumers, and excluding those suffered in relevant markets upstream. *Brunswick* simply notes that the Sherman Act was originally enacted to protect "individuals" and "especially consumers," 429 U.S. at 486 n.10, while *Cargill* doesn't discuss consumers at all. It appears the District Court simply misunderstood the case law references to "consumer," despite efforts by PLS at argument to correct that confusion. 2-ER-192-193.

If the District Court's analysis were correct, the cases cited *supra* in Part I.B.1 would not exist. But they do, and the District Court did not cite any authority to the contrary. The reason it cannot is clear: the District Court's rule would drive a hole through antitrust protections and immunize a wide swath of nakedly anticompetitive practices from scrutiny any time their effects were felt primarily by direct purchasers in upstream input markets rather than ultimate consumers. That is not the law, and rests upon a fundamental misapplication of the relevant antitrust standard.

3. The *Amex* decision is irrelevant, but PLS's allegations satisfy *Amex* in any event.

In addition to analyzing PLS's allegations at the wrong market level, the District Court also held that the Complaint was "fundamentally flawed" because it

believed that the Supreme Court's decision in *Amex*, 138 S. Ct. at 2280-82, required PLS to allege harm to competition "on both sides of the market." 1-ER-21. Because the District Court analyzed the plausibility of PLS's allegations of harm to competition at the level of buyers and sellers of residential real estate—what it called "the real estate market"—the District Court understood *Amex* to require plausible allegations of harm to both buyers and sellers of residential real estate. *Id*. Again, the District Court was mistaken. Its garbled application of *Amex* unravels as a veritable Russian-nesting doll of error, with one mistake nestled in the next.

First, no case supports the District Court's bald assertion that "*Amex* sets forth a pleading standard[.]" 1-ER-22. To the contrary, *Amex* (decided on a full record) involved the proper definition of a relevant market and the analysis of competitive effects, both of which under this Court's precedents are fact-bound issues not susceptible to resolution on a motion to dismiss. *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1044-45 (9th Cir. 2008).

Second, the District Court's discussion of *Amex* begins by repeating its original analytical mistake of analyzing the alleged harm to competition in the wrong market. Neither PLS nor the MLSs with which PLS was competing operate in a "real estate market," a market not alleged in the Complaint or proposed by the Defendants, and neither PLS nor the MLSs engage in any transactions with home

sellers or home buyers. The District Court's focus on the wrong relevant market renders its application of *Amex* irrelevant.

Third, and even if the District Court had tried to apply *Amex* to the correct relevant market—the one alleged in the Complaint and where PLS competed with the MLS Defendants and with the NAR-affiliated MLSs—dismissal would have been inappropriate. *Amex* does not apply to every two-sided platform, but only to "two-sided transaction platforms" that "facilitate a single, simultaneous transaction between participants." *Amex*, 138 S. Ct. at 2286. By contrast, real estate listing networks, while they may or may not be two-sided platforms, are not two-sided *transaction* platforms, let alone two-sided *simultaneous transaction* platforms. *See US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 57 (2d Cir. 2019) (emphasizing that the rule in *Amex* only applies to "two-sided *transaction* platforms") (quoting *Amex*, emphasis in *US Airways*). No transaction of any kind happens on a real estate listing network, simultaneous or not. 3-ER-568-569 (Compl. ¶ 99). Real estate listing networks are instead akin to the newspapers that the Court itself acknowledged were outside the rule announced in *Amex*. 138 S. Ct. at 2286; *see also* H. Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 COLUM. BUS. L. REV. 35, 87-88 (2019) (stating that "real estate

websites such as realtor.com and Zillow.com" do not implicate *Amex* for this reason).[4]

Fourth, and even assuming that *Amex* applied to competition in the listing network services market, the District Court misinterpreted that case and misstated the standard it set forth. Where it applies, *Amex* provides that a plaintiff alleging anticompetitive conduct in a two-sided simultaneous transaction market must show that the challenged conduct *either* (i) increased the "overall cost" of transactions on the platform above a competitive level or "reduced the number" of transactions on the platform, *or* (ii) "otherwise stifled competition" in the network services market where the two-sided platform competes. *Amex*, 138 S. Ct. at 2286-87.

The District Court gravely misinterpreted the first *Amex* criterion, interpreting that case to require allegations of harm to participants on both sides of the two-sided platform, which here would be real estate brokers representing both buyers and sellers. 1-ER-22. But *Amex* says nothing of the sort. Instead, *Amex* requires harm to participants on one side of the platform not outweighed by benefits to the other side, a dramatically different and less demanding standard than the one applied by the District Court. The Complaint easily meets this criterion of *Amex*, plausibly

[4] On this basis, a federal district court in the Northern District of Illinois recently refused to apply *Amex* in another case involving an alleged conspiracy between NAR and 20 MLSs. *See Moehrl v. Nat'l Ass'n of Realtors*, 492 F. Supp. 3d 768, 783 n.7 (N.D. Ill. 2020).

alleging harm to real estate brokers representing both home buyers and sellers from the elimination of competition in the listing network services market, maintaining the ability of the NAR-affiliated MLSs the power to set price and output in that market at supra-competitive levels. *See infra* Part I. B.4.a.

Worse, the District Court completely failed to consider the second *Amex* criterion—whether the Clear Cooperation policy "stifled competition" in the listing network services market where PLS and the MLSs compete—which PLS plainly alleged, and which was sufficient under *Amex*. *See infra* Part I.B.4.a. The District Court's misapplication of this aspect of *Amex* flows organically from its error in disregarding harm to competition and to the direct purchasers in the listing network services market (*i.e.*, the real estate brokers) and insisting instead on harm to the ultimate consumers (home sellers and buyers) in a distinct downstream market. With this stumble at the starting gate, the District Court's misapplication of *Amex* was inevitable.

Fifth, and synthesizing its various interpretative errors, the District Court purported to find and apply the following rule from *Amex*: "PLS must allege a plausible injury to ***both*** home sellers ***and home buyers***, which it has not done." 1-ER-22. This combines in a single statement each of the major errors the District Court made: analyzing competition at the wrong level of the market, applying *Amex* in a procedural posture in which it does not apply and to markets in which it does

not belong, deriving an inaccurate rule from that case, and ignoring the well-plead allegations of facts in the Complaint that satisfied the *Amex* criteria in both the relevant market alleged by PLS and in the distinct, downstream market on which the court erroneously focused. Each and every one of these analytical steps was wrong, and *Amex* is irrelevant here.

4. PLS adequately alleged harm to competition in any possible relevant market.

By precluding real estate brokers from offering pocket listings through listing networks, Clear Cooperation simultaneously harmed competition in the listing network services market and in the downstream market for brokerage services. In the listing network services market, competition from listing networks such as PLS that competed with the MLSs was eliminated, maintaining the ability of the MLSs to set the price of listing network services to brokers above competitive levels and frustrating broker demand for new and innovative listing network services. 3-ER-575 (Compl. ¶¶ 121-122). In the brokerage services market, consumer demand for pocket listings marketed through listing networks was frustrated, reducing consumer choice and welfare. 3-ER-570-573 (Compl. ¶¶ 105-115).

These well-pled allegations of fact plausibly allege harm to competition in any possible relevant market. Elevation of price above competitive levels, as alleged in the listing network services market, is a quintessential form of harm to competition. "[T]he antitrust laws are designed to protect customers from the harm

of unlawfully elevated prices." *Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 378 (9th Cir. 2003). But the antitrust laws prohibit more than artificially elevated prices; they also condemn concerted action that makes supply unresponsive to consumer demand, limits consumer choice, and harms innovation—all of which are consequences of the Clear Cooperation policy in both the markets for listing network services and the market for brokerage services. As the Supreme Court explained in *Indiana Federation of Dentists*, competitors may not agree to withdraw a desired service from the market by "pre-empt[ing] the working of the market by deciding for [themselves] that … customers do not need that which they demand." 476 U.S. at 462; *see also Glen Holly*, 352 F.3d at 374-75 (concerted action that results in less innovative products or that "detrimentally changed the market make-up and limited consumers' choice to one source of output" harms competition); *Amarel v. Connell*, 102 F.3d 1494, 1509 (9th Cir. 1997) (one form of antitrust injury is "coercive activity that prevents its victims from making free choices between market alternatives") (cleaned up).

a. The District Court erroneously disregarded harm to competition in the listing network services market.

The District Court did not directly analyze the sufficiency of PLS's allegations in the listing network services market, apparently because it erroneously believed that its analysis should focus on harm to buyers and sellers of residential real estate. Although the District Court did in passing express some doubt as to whether the

Clear Cooperation policy does reduce the ability and incentive of real estate agents to use listing networks, such as PLS, that compete with the MLSs, 1-ER-23-24, these cursory observations cannot support the District Court's Order.

The degree to which the Clear Cooperation policy reduces the ability and incentive of real estate agents to use networks, such as PLS, is a question of fact not susceptible to resolution on the pleadings. The Complaint alleges specific evidentiary facts, entitled to the presumption of truth at this stage, that explain how and why Clear Cooperation has this effect. 3-ER-555-559, -566-567, -570-572 (Compl. ¶¶ 27-49, 88-91, 105-113). Simply put, having been forced to use the MLS for all of their listings, real estate brokers have no incentive to use competing networks to market the same listings, with the practical effect of forcing brokers to use the MLS exclusively. These allegations are made even more plausible by the allegations that the Defendants foresaw and intended these effects, and that these effects were in fact realized as demand for PLS's services dried up once Clear Cooperation was promulgated. 3-ER-561-568 (Compl. ¶¶ 58-96). At this stage, these allegations are sufficient.

It is true, as the District Court observed, that "[o]n its face, the Clear Cooperation Policy does not preclude real estate professionals … from marketing their listings on PLS[,]" or "proscribe real estate professionals from making a choice about the listing network platforms in which they choose to participate." 1-ER-23-

24. But the relevant antitrust question is whether Clear Cooperation has the "practical effect" of deterring real estate brokers from using competing listing networks such as PLS, not whether it does so expressly or on its face, as the District Court seemed to require. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 326 (1961) ("practical effect" of agreement is what matters). Thus, in *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 457 (1922), the Supreme Court held that contract terms were illegal where their "practical effect" was to prevent use of competing products, even though "the clauses enjoined do not contain specific agreements not to use the machinery of a competitor." *See also FTC v. Qualcomm Inc.*, 969 F.3d 974, 1004 (9th Cir. 2020) (applying "*Tampa Electric*'s 'practical effect' test").

Other cases have condemned the specific mechanism of anticompetitive exclusion achieved through the Clear Cooperation policy. For example, an allegedly dominant provider of airline reservation network services imposed on its airline customers a set of obligations mandating that customers using rival networks also offer the same terms to the dominant firm. *US Airways, Inc. v. Sabre Holdings Corp.*, 105 F. Supp. 3d 265, 272 (S.D.N.Y. 2015), *aff'd in relevant part*, 938 F.3d 43 (2d Cir. 2019). The most significant of the bundle of restraints at issue there was identical to Clear Cooperation: an obligation that airline customers that submitted inventory for sale on rival reservation networks submit the same inventory to the

defendant's network. *Id.* at 272. As with Clear Cooperation, this "Full Content" provision in *US Airways* did not facially or expressly prohibit airlines from using rival networks. *Id*. at 282. And as with Clear Cooperation, the Full Content provision deterred airlines from using rival reservation networks, thereby "preventing the entry of competitors and … helping it maintain market power." *Id*. The district court found a triable Section 1 claim based on this evidence, and the Second Circuit affirmed. *US Airways*, 938 F.3d at 63.

Similar policies, mandating the use of one network while not expressly prohibiting the use of others, have been held to be actionable under the antitrust laws in other cases. *See CollegeNET, Inc. v. Common Application, Inc.*, 711 F. App'x 405, 406 (9th Cir. 2017) (reversing dismissal and holding that plaintiff alleged anticompetitive conduct from policy that required defendant's members to use its college application service in addition to any other service its members might use); *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1000-04 (9th Cir. 2008) (defendant's use of contract terms that required submission of advertisements to defendant without prohibiting submission of the same advertisements to the defendant's competitors created triable issue under the Cartwright Act); *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 69, 72-73 (2d Cir. 1988) (mandate to use defendants' events without prohibiting use of competing events had the practical effect of inhibiting competitive vitality of rival events). As

in *Maxon Hyundai Mazda v. Carfax, Inc.*, the fact that Defendants' conduct "do[es] not *prohibit*" customers from dealing with PLS is irrelevant because a real estate broker "that has already purchased" listing network services "from Defendant[s] under compulsion … is highly unlikely to purchase" listing network services from a second listing network "containing the same … data" as the MLS. 2014 WL 4988268, at *11 (S.D.N.Y. Sept. 29, 2014).

As NAR conceded at oral argument below, an express prohibition on the use of rival listing networks would be anticompetitive. 2-ER-207-208 (Tr. at 107:19-21, 107:25-108:3). Whether the Clear Cooperation policy, in practice and in the context of market realities, has the same *practical effect* as the express prohibition that NAR concedes would be illegal is a factual question not susceptible to resolution on the pleadings. Indeed, the District Court's findings that PLS had plausibly alleged an injury in fact from Clear Cooperation, 1-ER-17-18, 25, cannot be squared with its unwillingness to credit the Complaint's allegations that the exclusionary tendencies of Clear Cooperation caused PLS's injury.

PLS adequately alleged facts demonstrating that the Clear Cooperation policy harmed competition in the relevant market. The order below must be reversed.

b. The District Court erroneously disregarded harm to competition even in the brokerage services market it incorrectly analyzed.

Even with respect to the downstream, brokerage services market on which the District Court mistakenly focused—the District Court summarily disregarded well-pled factual allegations that, while not necessary to PLS's claims, established harm to competition in that market. These allegations satisfied even the incorrect legal standard the District Court erroneously applied. The District Court thus further erred by applying a flawed and unduly narrow understanding of the types of "output reductions" relevant to antitrust analysis, and by misapplying the Supreme Court's plausibility standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

First, the District Court concluded that PLS failed to allege harm to competition in the downstream market because the Complaint did not allege that the price of brokerage services increased as a result of the Clear Cooperation policy. 1-ER-21 & n.79. This was clear error. The Supreme Court rejected this precise argument in *Indiana Federation of Dentists*, where the Court expressly held that no such evidence was required. 476 U.S. at 460. In that case, it was sufficient that consumer demand for a specific package of dental services had been frustrated, despite the fact that there was no evidence that the price of dental services had increased or the quantity of dental services provided had declined. *Id.*; *see also Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959) ("[A]n

effect on prices is not essential to a Sherman Act violation."). This Court also rejected the proposition on which the District Court relied in *Glen Holly*, 352 F.3d at 374-75, where it explained that "while an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury" it "is not the only form of injury" that may establish harm to competition.

Second, the District Court also reasoned that PLS failed to allege harm in the downstream brokerage services market because PLS did not "adequately allege" that "home sellers and buyers have been denied brokerage services that they desire as a result of" the Clear Cooperation policy, or that home buyers and sellers were "deprived of any choice in products or services." 1-ER-20-21, 23-24. In reaching this conclusion, the District Court relied upon the continuing availability of less effective, less desirable means of marketing pocket listings to draw a factual inference at the pleading stage in *Defendants'* favor. This was a misapplication of the pleading standard. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). But even putting aside the District Court's improper and premature factual finding, its inference was not even reasonable. The District Court appeared to believe that Clear Cooperation allowed for the marketing of pocket listings in the way they had been traditionally marketed by real estate brokers—before the rise of listing networks—including face to face interactions with other brokers, through phone calls, and through email blasts. 1-ER-23-24. But NAR conceded that Clear Cooperation

extinguished this possibility, a concession that the District Court overlooked or ignored. *See* 2-ER-111-112 (Tr. 11:22-12:11).

The District Court also erred in relying on the so-called office exclusive exception to the Clear Cooperation policy to draw improper inferences against PLS on the pleadings. Pursuant to that exception, members of NAR-affiliated MLSs may market pocket listings to other real estate professionals employed by the same brokerage, but ***not*** through listing networks that compete with the MLS. The office exclusive exception does nothing to mitigate the harm to competition from Clear Cooperation in the listing network services market. And it is black-letter law that an agreement among competitors need not eliminate all forms of rivalry between the conspirators to violate Section 1. *Indiana Fed'n of Dentists*, 476 U.S. at 454-56 (condemning restraint despite remaining availability of alternatives less attractive to consumers); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 829-30 (6th Cir. 2011) (MLS rules that eliminated desired forms of marketing while allowing higher cost, less effective means of marketing harmed competition). The District Court erred in reaching a contrary outcome. Indeed, the office exclusive exception illuminates the anticompetitive purpose and effect of Clear Cooperation by showing that NAR does not object to its members marketing pocket listings—provided those members do not use listing networks that compete with the MLSs controlled by NAR's members.

Nevertheless, the District Court confidently concluded that the office exclusive exception is "significant" and "[s]urely … provides significant exposure of the property in an off-MLS setting." 1-ER-23 & n.87. But these factual findings are not proper under *Twombly*, either. The Complaint alleges that marketing pocket listings through a listing network was more efficient than the ways in which pocket listings had historically been marketed, including marketing within the boundaries of a single brokerage firm. 3-ER-559-562 (Compl. ¶¶ 50-68). A district court cannot ignore a complaint's plausible factual allegations to draw strained inferences in a defendant's favor. *Iqbal*, 556 U.S. at 678-79. And even if the District Court's interpretation of the office exclusive and non-NAR alternatives were *also* plausible, a "plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)" if "there are two alternative explanations" and "both" of them "are plausible." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

The District Court's final error was in relying on the ability of sellers to enlist the services of real estate brokers that are not NAR members to market pocket listings through PLS. 1-ER-23-24. This conclusion once again depends on ignoring the well-pled allegations in the Complaint, which alleges that many real estate brokers that are not NAR members depend on access to NAR MLSs to do their jobs, and are thus constrained by the Clear Cooperation policy just as much as are NAR members. 3-ER-555-556 (Compl. ¶¶ 32, 34).

C. PLS adequately alleged antitrust injury under the Clayton Act.

The District Court synthesized its erroneous readings of substantive antitrust law and of *Twombly*'s plausibility standard in yet another error, concluding based on "[b]asic economics" that the Clear Cooperation policy was either procompetitive or competitively neutral, from which the District Court held that—even if PLS *had* alleged facts implicating harm to "ultimate consumers"—PLS's injury from Clear Cooperation was not an antitrust injury since it did not derive from any conduct that harmed competition, as a matter of law. 1-ER-23-24.

Nothing in the Complaint, common sense, economic theory, or Rule 8(a) authorized this armchair theorizing or the inferences that the District Court drew against PLS. For starters, the District Court's antitrust injury analysis related to the *wrong market*, focusing entirely on the brokerage services market while ignoring the relevant market in this case, the listing network services market. The District Court ignored well-pled allegations that before the Clear Cooperation policy real estate brokers increasingly marketed pocket listings through PLS and other listing networks that compete with the MLS, and that Clear Cooperation extinguished this element of competition. When the plaintiff's injuries "stem from a competition-reducing aspect or effect of the defendant's behavior," antitrust injury is established. *ARCO*, 495 U.S. at 344. As in *Glen Holly*, PLS suffered an antitrust injury because "[this] is a case where the plaintiff has alleged an unlawful agreement, dressed up as

a competitor collaboration, to kill off a product in order to end competition, and a case where the plaintiffs' business which used that product was directly and intentionally strangled in the consummation of that agreement." 352 F.3d at 377; *see also Amarel*, 102 F.3d at 1509 (rivals excluded by anticompetitive conduct suffer antitrust injury).

Moreover, the District Court appeared to believe that because the MLS system has certain procompetitive aspects, the Clear Cooperation policy was by definition procompetitive because it enhances the number of listings in the MLS. But antitrust analysis of Clear Cooperation focuses on its incremental effect on competition, not on the benefits of the MLS system in the abstract. *NCAA*, 468 U.S. at 109 (describing restraint on television broadcasting as "naked" even though part of efficiency-creating joint venture). And the fact that Clear Cooperation may increase the number of listings in the MLSs by decreasing the number of listings available to rival networks shows that the policy actually *reduces* competition rather than enhancing it, as the District Court seemed to believe. *See* Hovenkamp, ¶ 1901(d) (explaining that "if a horizontal restraint involves exclusion of one or more rivals, the restraint may actually *increase* the output of the participants in the restraint while it reduces marketwide output."). Nothing allowed the District Court to decide on the pleadings that competition and consumers were better off with the MLSs having all the listings instead of the MLSs having some listings and PLS having others. The

District Court ignored the well-pled allegations of fact that some real estate brokers preferred to market some properties through PLS without submitting them to the MLSs as well, and the District Court was "not entitled to pre-empt the working of the market by deciding for itself that [Defendants'] customers do not need that which they demand." *Indiana Fed'n of Dentists*, 476 U.S. at 462.

The District Court theorized that the Clear Cooperation policy enhances access to information about listed properties by forcing submission of listings to the MLSs. 1-ER-24-25. But this is a misreading of the Complaint, which alleges that PLS had a broader base of potential members than do the NAR-affiliated MLSs, as PLS was open to all licensed real estate professionals while the NAR-affiliated MLSs may in many instances limit their membership to NAR members. 3-ER-555, -556, -561 (Compl. ¶¶ 29, 34, 59). Because PLS's membership was potentially broader than that of the MLSs, a policy such as Clear Cooperation that restricts the ability and incentive of real estate brokers to use competing listing networks would *reduce* rather than enhance the amount of information available in the market. Certainly nothing in the Complaint authorized the District Court to confidently predict otherwise.

The District Court's theorizing about the procompetitive justifications for the Clear Cooperation policy are also procedurally improper, and should instead await summary judgment, as the District Court acknowledged in other parts of its Order.

ER-28. *See High Tech. Careers v. S.J. Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993) ("Whether valid business reasons motivated a monopolist's conduct is a question of fact."); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991) ("defendant must offer evidence of pro-competitive effects").

The District Court relied upon *Pool Water Products v. Olin Corp.*, 258 F.3d 1024, 1036 (9th Cir. 2001), for the proposition that the Clear Cooperation policy, which requires listings that would have been marketed through PLS to be marketed instead through the MLSs, harmed neither competition nor consumers. 1-ER-25. This case is nothing like *Pool Water* (which was decided at summary judgment), where the excluded competitor's lost market share was causally connected to lower prices offered by the defendant, lower prices that benefitted consumers. 258 F.3d at 1036. In this case, the injuries suffered by PLS, the real estate brokers who are the direct purchasers of PLS's services, and the buyers and sellers of real estate served by those real estate brokers, all flow from an anticompetitive restriction in output rather than from a procompetitive expansion of output. The District Court seemed to believe that it was a matter of indifference as to whether listings were marketed through PLS (as brokers preferred) or through the MLSs (brokers' second choice), but this profoundly misreads the Complaint: brokers preferred to list through PLS because it allowed them to retain the attributes of privacy and discretion associated with pocket listings, attributes that were destroyed when through Clear Cooperation

the Defendants used their market power to force brokers to use the MLSs instead. The District Court misdiagnosed the effects of Clear Cooperation, missing its welfare-destroying attributes and ignoring the clear demand for listing through PLS rather than through the MLSs.

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The District Court erred by requiring harm to competition in the downstream market for brokerage services, and by failing to credit PLS's allegations that readily establish harm to competition, and antitrust injury to PLS, in the relevant market for real estate listing network services. The District Court erred further by rejecting PLS's well-pled allegations of harm to competition, and antitrust injury to PLS, even in the downstream market for brokerage services the court mistakenly analyzed. The order below cannot be sustained. This Court must reverse.

II. PLS Adequately Alleged That MRED Joined The Conspiracy.

In addition to holding that PLS did not allege harm to competition—and thus dismissing the entire Complaint—the District Court separately concluded that the Complaint failed adequately to allege that Defendant MRED was part of the alleged conspiracy. 1-ER-28. That was error: The Complaint plausibly alleged that MRED joined the conspiracy among the other Defendants and took overt acts in furtherance of that conspiracy with the intent of achieving the conspiracy's illegal purpose. Nothing more is needed to state a claim.

A Section 1 conspiracy requires proof of a "unity of purpose or a common design and understanding, or a meeting of minds," or "a conscious commitment to a common scheme." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (citation omitted). Proof of a conspiracy under § 1 of the Sherman Act does not, however, require the existence of an express agreement. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948). It is "enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939).

PLS alleged that in August 2019, MRED participated in a NAR Advisory Board meeting during which the Advisory Board voted to recommend the adoption of what would become Clear Cooperation. 3-ER-563 (Compl. ¶ 71). The Complaint also identified two crucial admissions resulting from this meeting: (1) NAR's acknowledgement that MRED was involved in formulating and advancing Clear Cooperation, and (2) MRED's concession that these private interfirm communications—among NAR-affiliated MLSs, MRED, and the other MLS Defendants—were the means by which the Clear Cooperation policy was formulated and advanced. 3-ER-563-564 (Compl. ¶¶ 72-74). The Complaint also alleges evidentiary facts that plausibly suggest that MRED and Bright privately agreed to work in tandem to eliminate the competitive threat from competing listing networks

by overcoming, through collective action, the remaining resistance of NAR members to the adoption of Clear Cooperation. 3-ER-563-566 (Compl. ¶¶ 75-88).

The District Court erred in characterizing these as merely allegations of parallel conduct. 1-ER-28. Instead, these are allegations of private communications and coordination, not just of similar marketplace behavior. The allegations that MRED first privately communicated with the other MLS Defendants and with NAR about the need for NAR to adopt and enforce the Clear Cooperation policy, and then worked in tandem with the other MLS Defendants to achieve that end, are easily sufficient to state claim. Agreement may be inferred from the conspirators' actions, including "uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996) (internal citations omitted). A triable issue of agreement is raised when a "course of conduct … once suggested or outlined by a competitor, in the presence of other competitors, is followed by all." *Esco Corp. v. United States*, 340 F.2d 1000, 1008 (9th Cir. 1965); *see also Gainesville Util. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 300-01 (5th Cir. 1978) (holding that correspondence that "contemplated and invited" concerted action was a plus factor supporting the inference of agreement); *United States v. Foley*, 598 F.2d 1323, 1331-32 (4th Cir. 1979) (leader announced its prior

decision to raise prices during a dinner party and mailed notice of the change, and competitors followed).

The District Court's reliance here on *In re Musical Instruments & Equipment Antitrust Litigation*, 798 F.3d 1186 (9th Cir. 2015), was error. The Complaint alleges extensive evidentiary facts showing the private interfirm communications between MRED, NAR, and the other MLS Defendants, while in *Musical Instruments* the plaintiffs made no such allegations, relying instead on the inference of such communications through parallel conduct and other so-called "plus factors" suggestive of a preceding agreement. The plaintiffs in *Musical Instruments* were also granted discovery, which was denied to PLS here.

The District Court also misapplied the law of conspiracy, seeming to find significance in the fact that MRED is not alleged to be an NAR-affiliated MLS or to have adopted NAR's Clear Cooperation policy. 1-ER-28. But it is black letter law that a defendant need not participate in every facet of a conspiracy to be liable as a co-conspirator. *United States v. Curley*, 55 F.3d 254, 256-57 (7th Cir. 1995). "One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense." *Salinas v. United States*, 522 U.S. 52, 65 (1997). In a civil action, once a conspiracy is shown, a specific defendant may be held liable even if it has only a "slight connection" to the conspiracy, did not know all the conspirators, did not participate in the conspiracy from its beginning or participate in all its

enterprises, or otherwise know all its details. *United States v. Reed*, 575 F.3d 900, 924 (9th Cir. 2009).

The District Court also misapplied *Twombly* in construing the Complaint's allegations with respect to MRED's role in the alleged conspiracy and the overt acts that MRED was alleged to have taken in furtherance of the conspiracy. Although not alleged to have adopted NAR's version of the Clear Cooperation policy, MRED participated in the formulation of that policy and worked to ensure its passage. Moreover, although discovery is necessary to understand how MRED's policies with respect to pocket listings vary from those later embodied in Clear Cooperation, the Complaint alleges that Defendant Bright believed that MRED had taken steps to quash the use of pocket listings on rival listing networks that were similar to Clear Cooperation. 3-ER-564-565 (Compl. ¶¶ 80-81). And in any event, at the pleading stage, unanimity of action among co-conspirators is not required to state a claim. *See, e.g.*, *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 428-29 (4th Cir. 2015) (rejecting defendants' argument that alleged parallel conduct must be "simultaneous" or "identical" or that, for conspiracy to be plausible, defendants must move in "lockstep").

The District Court also found implausible the Complaint's allegations that MRED was an actual or potential competitor to NAR-affiliated MLSs "given that each of the MLS Defendants serves a different geographic market." 1-ER-28. But

this Court has already held that MLSs serving different geographic markets *are* actual or potential competitors. *Freeman*, 322 F.3d at 1149-50. And it was error under *Twombly* to disregard the Complaint's specific evidentiary facts supporting the allegations of actual and potential competition between the MLS Defendants and PLS. More fundamentally, it is unclear what import the District Court assigned to this observation, as a conspiracy—even a *per se* illegal one—need not be comprised solely of competitors to be actionable. *Musical Instr.*, 798 F.3d at 1192.

III. The District Court Erroneously Denied PLS Leave To Amend.

At a minimum, this Court should reverse to provide PLS an opportunity to amend its Complaint. "Dismissal without leave to amend is proper only in 'extraordinary' cases." *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003) (citation omitted). District courts are thus instructed to grant leave to amend with "extreme liberality," *Brown*, 953 F.3d at 574, and whenever a complaint's "deficiencies can be cured with additional allegations that are 'consistent with the challenged pleading' and that do not contradict the allegations in the original complaint." *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011).

PLS requested leave to amend in its opposition to Defendants' motions to dismiss. 3-ER-375. The District Court nevertheless dismissed the Complaint without leave to amend. 1-ER-26. It relied on the fact that PLS had already amended once and on its unelaborated conclusion that amendment would be futile. *Id.*

This was error. Even assuming that PLS failed to state a claim for the reasons identified in the District Court's order, PLS could easily amend its Complaint to add additional allegations that Clear Cooperation harmed home buyers and sellers in the downstream market for brokerage services, including allegations further demonstrating why the alternatives to online networked pocket listings cited by the District Court are not equally suitable substitutes demanded by those customers. That is precisely what this Court did in *Big Bear Lodging Association v. Snow Summit, Inc.*, 182 F.3d 1096, 1102-03 (9th Cir. 1999), where the panel affirmed dismissal of some plaintiffs' claims for failure to allege antitrust injury, but held that it was legal error to dismiss these claims with prejudice and without leave to amend. *Id.* at 1101. The District Court committed this same error, and even if the balance of its order were correct (and it is not), it was required to provide PLS with an opportunity to amend.

The District Court did not identify any incurable defect in the Complaint. The closest it came to such a finding was its identification of what it believed to be a contradiction in PLS's allegations that Clear Cooperation was simultaneously a restraint on output in the provision by real estate brokers of brokerage listing services and an exclusionary practice in the upstream listing network services market. ER-19 & n. 77. But there is no contradiction; this is exactly how antitrust law works. The same restraint can be both an output restraint with respect to one set of injured

parties and an exclusionary practice with respect to another set of injured parties. *See* Hovenkamp, ¶ 2001 (discussed *supra*). The supposed contradiction discovered by the District Court is illusory, and cannot support denial of leave to amend.

The District Court also relied on *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013) for the proposition that a "district court has 'particularly broad' discretion to deny leave to amend where the plaintiff has previously amended." 1-ER-26. That case is readily distinguishable. In *Salameh*, the plaintiffs had been given two opportunities to amend, and "the district court gave Plaintiffs specific instructions on how to amend the complaint, and Plaintiffs did not comply." 726 F.3d at 1133. Here, PLS had previously amended its Complaint only once—to address certain factual assertions Defendants made in a meet-and-confer session, and before the Defendants had filed a motion to dismiss. PLS's one prior amendment was thus made without the benefit of the District Court's guidance in response to a motion to dismiss. *See Loreley Fin. v. Wells Fargo Secs., LLC*, 797 F.3d 160, 190 (2d Cir. 2015) ("Without the benefit of a ruling, many a plaintiff will not see the necessity of amendment or be in a position to weigh the practicality and possible means of curing specific deficiencies.").

It was a fundamental abuse of discretion for the District Court not to afford PLS the opportunity to amend its pleadings in response to the Court's order.

CONCLUSION

The District Court misapplied the law and incorrectly held that PLS failed to allege actionable harm to competition. Its decision dismissing the Complaint accordingly should be reversed. But at minimum, this Court should order the District Court to grant PLS leave to amend its Complaint.

Respectfully submitted, this 26th day of May, 2021.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiff-Appellant states that it knows of no related case pending in this Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number(s): 21-55164

I am the attorney or self-represented party.

This brief contains 13,966 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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